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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 954

SKANDER NASSER, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

N. GEORGE NASSER,
24 N. 6th Street,
Terre Haute, Indiana,

EDWARD L. HAMILTON,
Tune Building,
Terre Haute, Indiana,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on March 23, 1962.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the above judgment is printed in Appendix A, pages 21-26.

The opinion of the United States District Court for the Southern District of Indiana, Terre Haute Division, was entered on the 22nd day of May, 1961, and appears in Appendix of Record at page 179 accompanying and printed

together with petitioner's original brief filed in the Court of Appeals. (Said appendix is hereinafter referred to as "Record".) Said opinion is also appended to this petition as Appendix D, pages 31, 32.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on the 23rd day of March, 1962. Petitioner's petition for rehearing was timely filed as provided by the rules of the United States Court of Appeals for the Seventh Circuit, to-wit: April 2, 1962, and petitioner's petition for rehearing was denied on the 13th day of April, 1962. (Appendix E, page 33.)

This petitioner timely filed his application for stay of mandate pending final determination of this cause by the Supreme Court of the United States upon his application for a Writ of Certiorari; petitioner further says that said application for stay of mandate pending final determination of this cause by the Supreme Court of the United States upon his application on Writ of Certiorari was granted on the 17th day of April, 1962 in accordance with Rule 25 (B) of the United States Court of Appeals for the Seventh Circuit. (Appendix F, page 34.)

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

Jurisdiction was conferred upon the United States Court of Appeals for the Seventh Circuit by 28 U. S. C. 1291.

QUESTIONS PRESENTED.

I. Constitutional and Statutory.

The indictment (Appendix B, pages 27, 28), purportedly based upon Federal Statute 18 U. S. C. Section 1010, on which petitioner was convicted is in direct conflict with the existing law of our land and Article One (1), Paragraph Eight (8) of the Constitution of the United States of America, in this:

(1) The exclusive right to establish and define laws is vested in the Congress of the United States of America, as provided by the Constitution of the United States, Article One (1), Paragraph Eight (8).

(2) A federal judiciary cannot create crimes by judicial initiative. *Morrisette* v. *United States*, 342 U. S. 246.

(3) It is for Congress, not the Courts, to write the law. *Standard* v. *Olsen*, 74 S. Ct. 768.

II. Indictment Does Not Come Within the Purview of the Statute.

By the use of the word "solely" the plaintiff has in effect created a new federal statutory offense, in this, to-wit: making it a criminal offense by failing to use the loan SOLELY for home improvements, where in fact Title 18, Section 1010 makes no such provision. Congress only is delegated the right to enact and define crimes.

In *United States* v. *Amadio* (1954), 215 F. 2d 605 (C. C. A. 7th) which we feel is analogous to the case at bar, the motion to dismiss was overruled by the district court and was affirmed by a 2 to 1 decision. The dissenting opinion of Major, Chief Judge among other things was:

"It has always been the rule so far as I am aware,

that an indictment must be predicated upon the language of a statute, upon matters thereby prescribed, rather than upon language used by a court in discussing the statute."

On petition for certiorari, which was granted, *Amadio* v. *United States of America*, 348 U. S. 892, 75 S. Ct. 218, per curiam, this Court reversed and held:

"The judgment is reversed and the case remanded to the district court with directions to dismiss the indictment on the grounds it does not come within the purview of the statute."

It has been consistently held that to be consistent with the constitutional requirements of due process the terms of a particular charge shall not in effect create a new criminal offense and should not forbid or require the doing of an act in terms not within the statute, but must be sufficiently implicit so as to inform those that would be subject to it and liable to its penalty.

Ignatius Lanzetta, et al. v. *State of New Jersey*, 306 U. S. 451, and *Porter, Admr. OPA* v. *Block, et al.*, 156 F. 2d 264 are discussed later.

III. Before the Defendant Can Be Found Guilty, the Government Must Prove That He Unlawfully and Knowingly Violated an Existing Federal Statute.

The Court in *Morrissette* v. *United States*, 342 U. S. 246, 263, 96 L. Ed. 288, 300 said:

"The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe

the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.

"The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly (*United States* v. *Hudson & Goodwin* (U. S.), 7 Cranch 32, 3 L. Ed. 259; *United States* v. *Gooding* (U. S.), 12 Wheat 460, 6 L. Ed. 693) admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." (Our emphasis.)

In *Karchmer* v. *United States* (C. C. A. 7), 61 F. (2d) 623, the court said:

"We are not unmindful of the rule which makes the jury the sole judge of facts over which there is a conflict. We are not intending to usurp any of the jury's prerogatives. Had the record presented a case where conflicting inferences arose, or where the full significance of facts necessitated measurement and weighing by a jury, we would not disturb the verdict. But the verdict, as we view it, rests upon speculation and conjecture. Such being the fact, the case should not have been submitted to a jury. A verdict which finds its only support in conjecture and speculation cannot stand."

It is noted with interest at page 3 of the United States Court of Appeals' opinion the following:

"* * * the use of the word SOLELY is to give emphasis to the falsity of the statements * * *" also "The statements were false in that the proceeds were not to be used solely * * *." This is exactly what defendant takes issue with. The statute does not include the word SOLELY.

IV. The Evidence Clearly Shows That Defendant Did Not Make or Cause a False Statement to Be Made to FHA.

As to Count One the Government's Exhibit 3 (R. 166) a contract between home owner and defendant, shows on its face the following:

> "Owner to receive $950.00 for labor addition, pipe to install bathroom and interior finish."

The Government's Exhibit No. 7 is a credit application (R. 170) and their Exhibit 9 is a contract between the borrower and defendant's company. Exhibit 9 shows the following:

> "Owner to furnish all inside work. To furnish owner with $800.00 material and part cash for completing the inside work." (R. 172.)

Exhibit 9 pertained to Count 2.

On Exhibit 7. "Return to owner" is marked out but the following "for finishing inside work material" continues with something deleted. (R. 170.)

Since two counts in the indictment alleges defendant did "wilfully cause [illegible]," then the essence of the crime and failure to prove this element is fatal.

In *U. S. v. Cole*, 90 F. Supp. 147, at 153, the Court quoted from 317 U. S. 498 as follows:

> "In brief, the Court tells us that when Congress spoke of 'wilful' acts, they had in mind acts of the type which by common knowledge are done to 'conceal'. If the facts are such as would have the effect of 'revealing', to use the antonym of 'conceal', we are not in the domain covered by this section. All the cases decided since this decision was rendered had some elements of fraudulent concealment, to which the Court referred."

The same Court went on,

> "* * * if the criminal act is not committed at that time, we cannot take a subsequent act and retroject it to the time of filing and charge it as criminal."

The United States Court of Appeals' statement at page 5 of the opinion is:

> "The purport of the exhibits and related testimony was to prove the element of defendant's criminal intent."

The evidence clearly shows that the defendant did not intend nor wilfully cause any person to make a false or fraudulent statement. On the contrary, the exhibits showing that money was to be paid to the owner for certain work which was completed by them were given to the lending institutions who approved of the transaction. (R. 33 and 48.) It is necessary that the basic elements of this statute be proven, which are:

1. Making of a material false statement.
2. Knowledge of the maker that the statement is false.

Another essential element is lacking in the proof as to the question of intent, as to whether the perpetration of fraud was in his mind at that time.

U. S. v. *Hyde*, 15 F. 2d 816.

Essence of the crime is uttering and publishing of false documents with intent to influence the F. H. A.

Ross v. *U. S.*, 180 F. 2d 160.

These exhibits were executed before the loans were approved by and through the banking institutions, and these banking institutions kept these exhibits and knew how much each home owner was to receive for his work and materials he was to furnish.

V. The Defendant's Conviction Is Not Supported by Substantial Evidence That Excludes Every Reasonable Hypothesis Excepting That of Guilt, and It Was the Duty of the Trial Court to Find Defendant Not Guilty.

A conviction cannot rest upon an inference from an inference, a presumption based upon a presumption.

U. S. v. *Ross*, 92 U. S. 281, 283, 284.
Pashcon v. *U. S.* (C. C. A. 7), 70 F. 2d 491.
Symonette v. *U. S.* (C. C. A. 5), 47 F. 2d 686.

From the beginning of the trial to the end, the U. S. Attorney has the burden of establishing, beyond a reasonable doubt, every fact essential to the conviction of the defendant; the defendant has no burden to sustain; it is enough that his evidence, if any, taken with the Government's, raises a reasonable doubt of his guilt, in which event he is entitled to and must be acquitted. This rule is interwoven with and based upon the presumption of innocence, viz., that the defendant is presumed to be innocent and this presumption continues throughout the trial and during the deliberations of the jury, and is overcome when, and only when his guilt is established beyond a reasonable doubt. (*Coffin* v. *U. S.*, 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943.)

Unquestionably, there must have been a reasonable doubt in the mind of the trial judge as to the guilt of defendant, as the Court said (R. 162):

> "And I question very seriously if a grand jury would have indicted on this if they had the benefit of the two sides and all the fine ramifications that's been brought out here."

Again (R. 163), the Judge stated:

> "* * *, presumably again I say that a banking institution could conclude that that would be money paid out

by the home owner to someone for labor to complete the work on the bathroom and to install the fixtures. *I don't know.*" (Our emphasis.)

Again (R. 163) the Judge stated:

"* * *, I must find the defendant in this instance is guilty. Whether you call it technically or morally. *I think he's guilty under the act.*" (Our emphasis.)

Again (R. 164), the Judge stated:

"And I question what a jury would have done in this instance. Seriously. Especially where the language is spelled out in the contract."

In view of the Judge's comments, it is apparent that he entertained a doubt as to defendant's guilt or in other words the evidence was not sufficient to convict. Hence, it was the duty of the Court to resolve the doubt in favor of the defendant and find him not guilty. He should have sustained defendant's motion for finding not guilty (R. 125), at the close of the Government's evidence and also at the close of defendant's evidence.

We agree with the opinion insofar as the trial judge was sympathetic, yes, also he was very considerate and kind. We certainly do not intend to cast reflection on his honesty, integrity and sincerity. Notwithstanding, what we have said, shall the basic rules as to reasonable doubt and reconciling evidence in the light of defendant's innocence be ignored?

VI. Petitioner's Good Moral Character Raises a Stronger Presumption of Innocence and That He Would Not Be Guilty of the Crime.

The Government and petitioner filed a written stipulation of petitioner's good reputation for truth, veracity and moral character, which would have been testified to by one Reverend Thomas Mabley, rector of a church, who had known petitioner for 20 years. (App. G, page 35.)

One John William Poths, Jr. who lived in the same neighborhood with petitioner for 34 years testified that petitioner's general reputation for good moral character and truth and veracity was good. (App, 150, 151.)

As to good character creating a stronger presumption of innocence, the Court in *Times Co. v. Carlisle*, 94 Fed. 762 stated:

> "A good name is rather to be chosen than great riches and loving favor rather than silver and gold. The respect and esteem of his fellows are among the highest rewards of a well spent life vouchsafed to man in this existence. The hope of them is the inspiration of his youth, and their possession the solace of his latest years. A man of affairs, a business man, who has been seen and known of his fellowmen in the active pursuits of life for many years and who has developed a good character and an unblemished reputation, has secured a possession more useful and more valuable than lands or houses or silver or gold. Taxation may confiscate his lands, fire may burn his houses, thieves may steal his money but his good name and his good reputation ought to go with him to the end—a ready shield against the attacks of his enemies and a powerful aid in the competition and strife of daily life. 'Every man is presumed to be innocent of wrong until he is proved to be guilty; but when a heinous crime is charged upon a man whose character and reputation for honor and integrity has been unquestioned for years in the community in which he has lived, that character and

that reputation stands sponsors for his innocence, and raise a still stronger presumption, which accompanies him in private and public, in court and in council and in every situation in life, and which, acted upon and recognized daily by all men, a presumption that such a man would not be guilty of such a crime."

Evidence of good character or reputation of one charged with crime is always admissible. It is competent as evidence to generate a reasonable doubt of the guilt of the offense charged.

Hanley v. *U. S.*, 133 F. 2d 966 at 972.
Johnson v. *U. S.*, 269 F. 2d 72 (1959).

Statutes.

28 U. S. C. Section 1254.
28 U. S. C. Section 1291.
18 U. S. C. Section 1010.
U. S. Constitution, Article 1, Paragraph 8.
U. S. Constitution Fifth Amendment.

STATEMENT OF THE CASE.

The petitioner for reasons of brevity has omitted the concise statement of the case as same will be elaborated upon hereafter and primarily under reasons for granting the writ.

REASONS FOR GRANTING WRIT.

I. Invasion by Courts of Rights Vested Only in Congress.

This case clearly involves the interpretation and expansion, by judicial initiative, of 18 USC 1010 which pertains to F. H. A. insured loans.

The petitioner charges that the indictment under which he was convicted is a violation of Article One (1), Paragraph Eight (8) of the Constitution of the United States.

The trial and conviction under the indictment as written violated the petitioner's constitutional rights as protected by Amendment Five (5) of the constitution of the United States, in this to-wit:

> "No person shall be * * * deprived of life, liberty or property, without due process of law."

In this case the indictment as returned, and under which petitioner was convicted, did not come within the purview of the statute. By the use of the word "solely" the plaintiff in effect created a new federal statutory offense, to-wit: making it a criminal offense by failing to use the loan solely for home improvements, where in fact Title 18, Section 1010 makes no such provision. Congress only is delegated the right to enact and define crimes.

In *United States* v. *Amadio* (1954), 215 F. 2d 605 (C. C. A. 7th), the motion to dismiss was overruled by the district court and was affirmed by a 2-to-1 decision. The dissenting opinion of Major, Chief Judge among other things was:

> "It has always been the rule so far as I am aware, that an indictment must be predicated upon the language of a statute, upon matters thereby proscribed, rather than upon language used by a court in discussing the statute."

On petition for certiorari, which was granted, *Amadio* v. *United States of America*, 348 U. S. 892, 75 S. Ct. 218, per curiam, the Court reversed and held:

> "The judgment is reversed and the case remanded to the district court with directions to dismiss the indictment on the grounds it does not come within the purview of the statute."

Likewise, it has been consistently held that to be consistent with the constitutional requirements of due process the terms of a particular charge shall not in effect create a new criminal offense and should not forbid or require

the doing of an act in terms not within the statute, but must be sufficiently implicit so as to inform those that would be subject to it and liable to its penalty. *Lanzetta v. State of New Jersey*, 306 U. S. 451. In this case, at page 453, the Court said:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." (Our emphasis.)

In *Porter, Admr., OPA v. Bl[illegible]*, 150 F. 2d 264, the Court stated:

> "Court should not read into penal statutes, even when they are enacted for public good, provisions not restricted by legislative authority."

The addition of the word "solely" in the indictment in effect created a new Federal statutory offense. Each count among other things states:

> "Had no intention of using the said loan proceeds solely for * * *" (R. 4, 5.)

There is no prohibition in the act which denies the home owner the right to do labor or to purchase material in aiding the petitioner herein in remodeling or repairing his home.

II. Intent Is an Essential Element to Sustain a Conviction.

Government's Exhibit 3 (App. 166), a contract between home owner and petitioner, shows:

> "Owner to receive $950.00 for labor, addition, pipe to install bathroom and interior finish."

The Government's Exhibit No. 7 is a credit application (R. 170) and their Exhibit 9 is a contract between the bor-

rower and defendant's company. Exhibit 9 shows the following:

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Since two counts in the indictment allege defendant did "wilfully cause * * *", then this is the essence of the crime and failure to prove this element is fatal.

In *U. S. v. Cole*, 90 F. Supp. 147, at 153, the Court quoted from 317 U. S. 498 as follows:

> "In brief, the Court tells us that when Congress spoke of 'wilful' acts, they had in mind acts of the type which by common knowledge are done to 'conceal.' If the facts are such as would have the effect of 'revealing,' to use the antonym of 'conceal,' we are not in the domain covered by this section. All the cases decided since this decision was rendered had some elements of fraudulent concealment, to which the Court referred."

The same Court went on,

> "* * * if the criminal act is not committed at that time, we cannot take a subsequent act and retroject it to the time of filing and charge it as criminal."

The United States Court of Appeals' statement at page 5 of the opinion to-wit:

> "The purport of the exhibits and related testimony was to prove the element of defendant's criminal intent."

The evidence clearly shows that the defendant did not intend nor wilfully cause any person to make a false or fraudulent statement. On the contrary, the exhibits show-

ing that money was to be paid to the owner for certain work which was completed by them were given to the lending institutions who approved of the transaction. (R. 33 and 48.) The defendant is at a loss to reconcile the above statement when the basic elements of this statute be proven, are:

1. Making of a material false statement.

2. Knowledge of the maker that the statement is false.

Smith v. *U. S.*, 230 F. 2d 935.

Rolland v. *U. S.*, 200 F. (2) 678.

Another essential element is lacking in the proof as to the question of intent, as to whether the perpetration of fraud was in his mind at that time.

U. S. v. *Hair*, 15 F. 2d 816.

Essence of the crime is uttering and publishing of false documents with intent to influence the F. H. A.

Ross v. *U. S.*, 180 F. 2d 160.

The Court in *Morrissette* v. *United States*, 342 U. S. 246, 263, 96 L. Ed. 288, 300, said:

> "The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.

In *U. S.* v. *Thomas*, 150 F. 2d 85 at 93 which was an FHA case, the Court stated:

> "The crime was conspiracy to 'cause to be made' an

> instrument 'knowing the same to be false' and 'for purpose of influencing—the action of said administration.' Knowledge of falsity and a purpose, that is, intent to us the falsehood for such influence, is the essence of the crime. It is not sufficient to prove Thomas guilty to show that he signed document with an untruthful statement which might tend to influence the administration. The burden is on the Government to prove his knowledge of its falsity and his criminal intent so to influence the Administration's acceptance of the borrower's note."

These exhibits were executed before the loans were approved by and through the banking institutions. These banking institutions kept these exhibits and knew how much each home owner was to receive for his work and materials he was to furnish. In view of these exhibits showing lack of intent, we respectfully submit that this petition be granted.

DEFENDANT MUST BE FOUND NOT GUILTY IF THERE BE A REASONABLE DOUBT.

Without unduly burdening the court on this proposition of law, it is of interest to note the colloquy between the trial judge and petitioner's counsel at the conclusion of the trial, as follows:

> "And I question very seriously if a grand jury would have indicted on this if they had the benefit of the two sides and all the fine ramifications that's been brought out here." (R. 162.)

Again (R. 163), the Judge stated:

> "* * *, presumably again I say that a banking institution could conclude that that would be money paid out by the home owner to someone for labor to complete the work on the bathroom and to install the fixtures. I don't know."

Again (R. 163) the Judge stated:

> "* * *, I must find the defendant in this instance is guilty. Whether you call it technically or morally. I think he's guilty under the act."

Again (R. 164), the Judge stated:

> "And I question what a jury would have done in this instance. Seriously. Especially where the language is spelled out in the contract."

In view of the Judge's comments, it is apparent that he entertained a doubt as to defendant's guilt or in other words the evidence was not sufficient to convict. Hence, it was the duty of the Court to resolve the doubt in favor of the defendant and find him not guilty. He should have sustained defendant's motion for finding not guilty (App. 125), at the close of the Government's evidence and also at the close of defendant's evidence.

A conviction cannot rest upon an inference from an inference, a presumption based upon a presumption.

> *U. S. v. Ross*, 92 U. S. 281, 283, 284.
> *Pasheon* v. *U. S.* (C. C. A. 7), 70 F. 2 491.
> *Symonette* v. *U. S.* (C. C. A. 5), 47 F. 2 686.

From the beginning of trial to the end, the U. S. Attorney has the burden of establishing, beyond a reasonable doubt, every fact essential to the conviction of the defendant; the defendant has no burden to sustain; it is enough that his evidence, if any, taken with the Government's raises a reasonable doubt of his guilt, in which event he is entitled to and must be acquitted. This rule is interwoven with and based upon the presumption of innocence, viz., that the defendant is presumed to be innocent and this presumption continues throughout the trial and during the deliberations of the jury, and is overcome when, and only

when his guilt is established beyond a reasonable doubt. *Coffin* v. *U. S.*, 162, U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943.

Presumption of innocence surrounding defendant in a criminal prosecution continues to operate until overcome by proof of guilt beyond reasonable doubt, and is not to be confused with burden of proof, which is a rule affecting merely the time and manner of proof.

United States v. *Fleishman* (1950), 70 S. Ct. 739, 339 U. S. 349.

In view of the Court's doubts as to the defendant's guilt, and his finding of guilty, we submit that said decision is erroneous, and relates to petitioner's substantial rights which have been violated and said conviction should be set aside and petitioner freed.

In *McCandless et. al.* v. *United States*, 298 U. S. 342, 347, this Court stated:

> "* * * an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial."

When the Court stated:

> "* * * presumably again I say that a banking institution could conclude that that would be money paid out by the home owner to someone for labor to complete the work on the bathroom and to install the fixtures. *I don't know.*" (Our emphasis.) (R. 163.)

then it was incumbent on the Court to reconcile this evidence in the light of petitioner's innocence. Any doubt must be resolved in favor of the accused. We feel it unnecessary to cite authorities.

CONCLUSION.

In view of the assessment of $1,000.00 fine on each count, and no prison sentence, it may indeed seem singular to many the occasion which manifests the filing of this petition. Especially is this true when the costs of appeal to the U. S. Court of Appeals for the Seventh Circuit, the petition for rehearing which was denied, and the petition for a Writ of Certiorari far exceeds the fine assessed many times. But to many who have cherished and lived the honorable way of life, the question of dollars is insignificant. In view of the questions presented, petitioner earnestly prays that a Writ of Certiorari issue. The doubt expressed by the trial judge, as well as the several constitutional and important Federal questions raised, make it imperative that they be settled once and for all by this Court.

The granting of this petition for a Writ of Certiorari will sustain and reaffirm the fundamental principles of criminal jurisprudence in the Federal jurisdiction.

Respectfully submitted,

N. George Nasser,
24 N. 6th Street,
Terre Haute, Indiana.

Edward L. Hamilton,
Tune Bldg.,
Terre Haute, Indiana,
Counsel for Petitioner.

May , 1962.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

September Term, 1961—January Session, 1962.

No. 13491. United States of America, *Plaintiff-Appellee,* *vs.* Skander Nasser, Jr., *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

MARCH 23, 1962.

Before HASTINGS, *Chief Judge*, DUFFY and SWYGERT, *Circuit Judges*.

Hastings, Chief Judge. Defendant was charged in a two-count indictment with violations of Title 18, U. S. C. A. 1010.[1]

Following a trial to the court, without the intervention of a jury, defendant was found guilty as charged on each

1. "1010. Federal Housing Administration transactions

"Whoever, for the purpose of obtaining any loan * * * from any person, * * * with the intent that such loan * * * shall be offered to or accepted by the Federal Housing Administration for insurance, * * * or for the purpose of influencing in any way the action of such Administration, makes, * * * any statement, knowing the same to be false, * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both."

count of the indictment. Judgment of conviction was entered thereon, and it was adjudged that defendant pay a fine in the sum of $1,000 on each count, together with the costs of the action. No sentence of imprisonment was imposed. This appeal followed.

The trial court denied defendant's motions to dismiss the indictment, for disclosure of evidence before the grand jury, for acquittal at the close of the Government's case and at the close of defendant's case and overruled defendant's objections to the admission of oral testimony relating to certain Government exhibits.

The errors relied on for reversal arise out of such adverse rulings.

Count I of the indictment charges:

> "That on or about March 26, 1959 Skander Nasser, Jr., at Universal, State of Indiana, in the Terre Haute Division of the Southern District of Indiana, for the purpose of obtaining a home improvement loan for George K. Domieka on premises located in Universal, Indiana, from the Citizens Investment Company, Terre Haute, Indiana, and with the intent that said loan be offered to and accepted by the Federal Housing Administration for insurance, did unlawfully, knowingly and wilfully cause the said George K. Domieka to make a false statement, to wit: statement captioned 'Credit Application for Property Improvement Loan' dated March 26, 1959, in the amount of $3,500.00 to the Citizens Investment Company, Terre Haute, Indiana, which statement was false in that it showed that the loan proceeds would be used as 'siding, electric pump, room on house and bathroom,' whereas the said Skander Nasser, Jr. then and there well knew that said statement was false in that George K. Domieka had no intention of using the said loan proceeds solely for 'siding, electric pump, room on house and bathroom,' as aforesaid on the said premises."

Count II is in substance to the same effect setting out another such occurrence with different parties. Our determination of the sufficiency of Count I applies equally to Count II.

The charge that defendant "did unlawfully, knowingly and wilfully cause the said George K. Domicka to make a false statement" is sufficient to properly charge defendant as a principal under Title 18, U. S. C. A. 2. *United States v. Thomas*, 7 Cir., 202 F.2d 374, 375, 378 (1953).

The charge in Count I further recites that "whereas the said (defendant) then and there well knew that said statement was false in that George K. Domicka had no intention of using the said loand proceeds solely for 'siding, electric pump, room on house and bathroom,' as aforesaid on the said premises." (Emphasis added.) Defendant contends that the Government, by use of the word solely, "in effect created a new federal statutory offense" not within the purview of 18 U. S. C. A. 1010. There is no merit in this argument.

A careful reading of the indictment demonstrates that the use of the word solely is to give emphasis to the falsity of the statements the defendant is charged with having caused to be made. The statements were false in that the proceeds of the loan were not to be used solely for the purposes set forth. The material part of the offense was the act of causing false statements to be made.

The indictment is "a plain, concise and definite written statement of the essential facts constituting the offense

2. Principals.

a. Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

b. Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17, 65 Stat. 717.

charged." Rule 7, Federal Rules of Criminal Procedure, Title 18, U. S. C. A. It contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet and is adequate should other similar proceedings be brought against him, to enable him to frame a plea of former jeopardy. *United States* v. *Debrow*, 346 U. S. 374, 376 (1953). It fully meets the standards of sufficiency laid down by the courts in a long line of decisions. *See United States* v. *Jones*, *supra* at 378, and cases cited therein. We hold that the trial court did not err in denying defendant's motion to dismiss the indictment.

For the same reasons, we reject defendant's contention that his conviction on the indictment as drawn was a denial of due process under the Fifth Amendment. His reliance on *United States* v. *Amodeo*, 348 U. S. 892 (1954), reversing per curiam, 7 Cir., 215 F. 2d 605 (1954), and other cases cited is misplaced.

Defendant argues that the trial court should have disclosed to him the record and transcript of the evidence presented to the grand jury upon which the indictment was founded. The tenor of defendant's motion for disclosure is that he did not know what transpired in the grand jury proceedings. He makes no showing of irregularity or of any particularized need. He has in no way discharged his burden to make a positive and strong showing of compelling necessity which would outweigh the traditional policy of secrecy surrounding grand jury proceedings. *Pittsburgh Plate Glass Co.* v. *U. S.*, 360 U. S. 395 (1959); *United States* v. *Procter & Gamble*, 356 U. S. 677 (1958).

Any disclosure of grand jury minutes in a criminal proceeding is covered by Rule [illegible] of F. R. Cr. P., 18

U. S. C. A. Under this rule disclosure is committed to the discretion of the trial judge. The Supreme Court has said that cases where grand jury minutes are needed to impeach a witness to refresh the recollection of a witness or to test the credibility of witnesses are examples of particularized need where the ends of justice require disclosure. *Pittsburgh Plate Glass Co.* v. *U. S.*, *supra* at 400, citing *United States* v. *Procter & Gamble*, *supra* at 682.

We hold that defendant has not met the standards imposed by these decisions and that the trial court did not abuse its discretion in denying disclosure of the grand jury proceedings to defendant.

Defendant contends that the trial court erred in admitting oral testimony relating to Government Exhibit [illegible] and on the ground that such testimony varied the terms of a written instrument. Exhibit [illegible] is a contract between the home owner named in Count I and defendant. Exhibit [illegible] is a credit application and Exhibit [illegible] is a contract between the borrower named in Count II and defendant. [illegible] The purport of the exhibits was related to the jury [illegible] to prove the elements of defendant's criminal intent. We [illegible]

examined this testimony and the exhibits. We are satisfied that such testimony was germane to the issue of insanity and is not subject to the vice asserted by defendant. We find no error in admitting such testimony.

Defendant argues at great length that the evidence does not show that defendant violated the statute of attempt, that his convictions is not supported by substantial evidence and that the trial court was not persuaded of defendant's guilt beyond a reasonable doubt.

We have carefully considered the record in this case and the colloquy between the trial court and counsel at the conclusion of the trial. We find that the record adequately establishes defendant's guilt beyond a reasonable doubt. The remarks of the trial court that defendant wants to create more than of a sympathetic judge who exhibited an understanding of defendant's personal feelings in such a situation. The fact that the court was satisfied with defendant is not imposing a prison sentence should not be taken to mean there was any reasonable doubt in the court's mind of defendant's guilt. We find no error in the denial of defendant's motions for acquittal.

We have considered other contentions of defendant. It is our considered judgment that he received a fair trial at the hands of an experienced and able trial judge. We find no prejudicial error in the record.

The judgment of conviction appealed from is affirmed.

AFFIRMED.

APPENDIX B

The Indictment in Two Counts

UNITED STATES DISTRICT COURT
Southern District of Indiana
Terre Haute Division

United States of America
vs.
Skander Nasser, Jr.
} No. TH 60 Cr 31

COUNT I [18 U.S.C. § 80] Loan

The Grand Jury charges:

That on or about March 29, 1960 Skander Nasser, Jr., at Universal, State of Indiana, in the Terre Haute Division of the Southern District of Indiana, for the purpose of obtaining a home improvement loan for George K. Dornicka on premises located in Universal, Indiana, from the Citizens Investment Company, Terre Haute, Indiana, and with the intent that said loan be offered to and accepted by the Federal Housing Administration for insurance, did unlawfully, knowingly and wilfully cause the said George K. Dornicka to make a false statement, to wit: statement captioned "Credit Application for Property Improvement Loan" dated March 29, 1960, in the amount of $[illegible] to the Citizens Investment Company, Terre Haute, Indiana, which statement was false in that it showed that the loan proceeds would be used as "siding, electric pump, room on house, and bathroom," whereas the said Skander Nasser,

Jr. then and there well knew that said [illegible]
in that George K. Bradley [illegible]
said loan proceeds solely for "roofing, [illegible]
on house and bathroom," as aforesaid [illegible]

[illegible]

The Grand Jury further charges:

That on or about June 23, 1958, [illegible]
Terre Haute, State of Indiana, in the [illegible]
of the Southern District of Indiana, [illegible]
taining a home improvement loan for Lester L. Beasley on
premises located at 243 West Johnson Street, West Terre
Haute, Indiana, from the Indiana State Bank of Terre
Haute, Terre Haute, Indiana, and with the intent that said
loan be offered to and accepted by the Federal Housing
Administration for insurance, did knowingly, knowingly
and wilfully cause the said Lester L. Beasley to make a
false statement, to wit: statement captioned "Application for Property Improvement Loan," dated June
23, 1958, in the amount of $2,770.00 to the Indiana Bank of
Terre Haute, Terre Haute, Indiana, which statement was
false in that it showed that the loan proceeds would be
used for "roofing, siding, alum canopy, porch floor, inside
floors, for furnishing inside work," whereas the said
Skander Nasser, Jr. then and there well knew that said
statement was false in that Lester L. Beasley had no intention of using the said loan proceeds solely for "roofing,
siding, alum canopy, porch floor, inside floors, for furnishing inside work," as aforesaid on the said premises.

A True Bill.

PAUL M. SCHULTZ
Foreman

DON A. DABBERT,
United States Attorney

APPENDIX C

Federal Statutes Involved as Passed by Congress

CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT

No * * * shall be deprived of life, liberty or property without due process of law

28 USC, SECTION 1254

(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

APPENDIX D

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of.

It Is Adjudged that the defendant pay a fine unto the United States of America in the sum of $1,000 on Count I and $1,000 on Count II of the Indictment together with the costs of this action.

It Is Further Ordered that the fine and sentence be stayed for a period of ten (10) days from this date.

WILLIAM E. STECKLER,
United States District Judge.

APPENDIX E.

(Rehearing Denied)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Friday, April 13, 1962.

Before:

Hon. John S. Hastings, Chief Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. Luther M. Swygert, Circuit Judge.

United States of America, *Plaintiff-Appellee*, vs. Skander Nasser, Jr., *Defendant-Appellant*.	Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.
No. 13491	

It is ordered by the Court that Appellant's petition for a re-hearing in the above entitled cause, be, and the same is hereby, DENIED.

APPENDIX F.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, April 17, 1962.

Before: Hon. John S. Hastings, Judge.

United States of America, *Plaintiff-Appellee.* vs. Skander Nasser, Jr., *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.
No. 13491	

On consideration of motion of defendant-appellant to stay issuance of mandate in this cause until May 30, 1962, and in view of the provisions of Rule 22 of the Supreme Court Rules relating to the time for filing a petition for writ of certiorari to review the judgment of a court of appeals in a criminal case;

IT IS ORDERED, that the issuance of the mandate in this case be stayed for a period of thirty (30) days from the date the entry of judgment herein became final by the denial of defendant-appellant's petition for a rehearing entered on April 13, 1962; all without prejudice to the right of defendant-appellant to petition this Court for a further stay consistent with any extension of time that may be granted by the Supreme Court for filing petition for writ of certiorari in this cause.

APPENDIX G.

Stipulation.

It is hereby stipulated by and between the defendant, Skander Nasser, Jr., his attorney, N. George Nasser, and the United States of America, that if called to testify in the trial of the above entitled cause one Thomas Mabley, Episcopal minister, presently residing at Daytona Beach, Florida, and formerly for 20 years Rector of St. Stephen's Episcopal Church at Terre Haute, Indiana, if asked, whether he is acquainted with the reputation of the defendant, Skander Nasser, Jr. would say he knew him up to the summer of 1960, when said Thomas Mabley changed his residence from Terre Haute, Indiana to Daytona Beach, Florida, and he would answer that he is. That if asked if he is acquainted with the defendant's reputation for truth, veracity and moral character during such period, he would answer that he is. That if asked what that reputation was for truth, veracity and moral character, that he would state that it was good.

Furthermore, said witness, Thomas Mabley, would testify that he has not seen Mr. Skander Nasser, Jr. since the date of his departure from Terre Haute, Indiana. Said Thomas Mabley would also testify that he has no personal knowledge of any of the facts relating to this case. That said Thomas Mabley would testify he is now Rector of Holy Trinity by the Sea Episcopal Church at Daytona Beach, Florida.

N. George Nasser,
Attorney for Defendant.
24 N. 6th Street,
Terre Haute, Ind.

United States of America,
By: Don A. Tappert,
Donald A. Tappert,
U. S. District Attorney.
Federal Building,
Indianapolis, Indiana.

REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 951

SKANDER NASSER, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

N. GEORGE NASSER,
24 North 6th Street,
Terre Haute, Indiana,

EDWARD L. HAMILTON,
Tune Building,
Terre Haute, Indiana,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 951.

SKANDER NASSER, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

REPLY TO RESPONDENT'S ARGUMENT 1.

Indictment Did Not Fall Within the Purview of the Statute.

Also

No Intent to Violate the Statute Was Proven.

Without repetition we respectfully submit that the use of the word "solely" in effect created a new Federal statutory offense. Nowhere in 18 USCA 1010 is the word mentioned.

Petitioner submits there is nothing in the statute under which he was convicted to justify the inclusion of the word "solely." The insertion of the word "solely" not only runs counter to *Amadio v. United States*, 348 U. S. 892, 75 S. Ct. 218, but violates *Lanzetta et al. v. State of New Jersey*, 306 U. S. 451, 453, as follows:

> "* * * It is the Statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."

Chief Judge Major, at page 616 of *U. S. v. Amadio*, 215 F. 2d 605, continued:

> "The Court approved an instruction in the *Athanasaw Case*, 227 U. S. 326, 33 S. Ct. 285, 286, 'The intent and purpose of the defendant at the time of the furnishing of this transportation * * * is the very gist and question in this case.'"

When the defendant executed Government's Exhibits 3, 7 and 9, wherein he stated the home owners were to be paid for certain material and labor to finish the job, there could no intent to violate Section 1010.

Would not Government's Exhibit 3, at R. 166, showing the home owner was to receive cash money for labor and material to be furnished by him, show there was no intent to violate the law?

Would not Government Exhibits 7, R. 170, and 9, R. 172, which likewise showed the home owner was to receive cash money for labor and material to be furnished by him show there was no intent to violate the law? These three exhibits clearly show the purpose of the loan.

In *U. S. v. Cole*, 90 F. Supp. 147, at 153, the Court quoted from 317 U. S. 498 as follows:

> "In brief, the Court tells us that when Congress spoke of 'wilful' acts, they had in mind acts of the type which by common knowledge are done to 'conceal.' If the facts are such as would have the effect of 'revealing,' to use the antonym of 'conceal,' we are not in the domain covered by this section. All the cases decided since this decision was rendered had some elements of fraudulent concealment, to which the Court referred."

The same Court went on,

> "* * * if the criminal act is not committed at that time, we cannot take a subsequent act and retroject it to the time of filing and charge it as criminal."

All of the material and labor mentioned in Count 1 were furnished and work completed. (R. 128.) Additional work was done by petitioner and no extra charge was made. (R. 128.)

All of the material and labor listed in Count 2 were furnished and work completed. (R. 129.) A new room was added for which no charge was made. (R. 129, 130.)

REPLY TO RESPONDENT'S ARGUMENT 2

If There Be a Reasonable Doubt as to Guilt, a Finding of Not Guilty Must Follow.

At page 6 of the Government's brief in opposition to our petition, the learned counsel in quoting from the appendix, conveniently overlooked the following at R. 162:

> "And I question very seriously if a grand jury would have indicted on this if they had the benefit of the two sides and all the fine ramifications that's been brought out here."

In addition to the grand jury comment, the Judge (at R. 163) said:

> "• • • presumably again I say that a banking institution could conclude that that would be money paid out by the home owner to someone for labor to complete the work on the bathroom and to install the fixtures. *I don't know.*" (Our emphasis.)

Again (R. 163) the Judge stated:

> "• • • I must find the defendant in this instance is guilty. Whether you call it technically or morally, I *think* he's guilty under the act." (Our emphasis.)

Again (R. 164), the Judge stated:

> "And I *question what a jury would have done in this instance*. Seriously. Especially where the language is spelled out in the contract." (Our emphasis.)

ARGUMENT.

Every item listed in the indictment of two counts, were furnished and additional work not contracted for, was made without additional charge. The Government's Exhibits 3, 7 and 9 conclusively show that there was no intent to violate 18 U. S. C. 1010.

When the trial judge at R. 163 stated:

> "• • •, presumably again I say that a banking institution could conclude that that would be money paid out by the home owner to someone for labor to complete the work on the bathroom and to install the fixtures. *I don't know.*" (Our emphasis.)

He evidenced a doubt of the defendant's guilt then and there, and he should have resolved such doubt in favor of this defendant.

There is no question but what the trial judge entertained a doubt as to defendant's guilt. We agree that the fact the Judge was "sorry" does not evidence doubt as to guilt, but the Judge stated:

> "And I question very seriously if a grand jury would have indicted on this • • •." (R. 162.)
>
> "• • • I think he is guilty under the Act." (R. 163.)
>
> "And I question what a jury would have done in this instance. Seriously. Especially where the language is spelled out in the contract." (R. 164.)

Thusly, he plainly and unequivocally showed he had doubt as to defendant's guilt.

That the trial judge was in effect, by his remarks, creating negative facts from the evidence so as to show reasonable doubt.

The record is devoid of any evidence of concealment of the commission or perpetration of any fraudulent act on the part of this petitioner to defraud F.H.A. in view of Government's Exhibits 3, 7, and 9 which the lending institution had in their possession. If there was any concealment, fraud or any violation of 18 USCA 1010, such concealment, fraud or violation of the act, was committed by the lending agencies and not by this petitioner.

CONCLUSION.

The granting of this petition for a Writ of Certiorari will re-affirm fundamental principles of criminal law.

Respectfully submitted,

N. George Nasser,
24 North 6th Street,
Terre Haute, Indiana.

Edward L. Hamilton,
Tune Building,
Terre Haute, Indiana.
Counsel for Petitioner.

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642050—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 951

SKANDER NASSER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 21–26) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1962. A petition for rehearing was denied on April 13, 1962. The petition for a writ of certiorari was filed on May 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an offense under 18 U.S.C. 1010 was charged in an indictment which stated that a false statement was made in an application for an FHA

home improvement loan because the defendant knew that the proceeds would not be used "solely for" the purposes described in the loan application.

2. Whether the evidence was sufficient to support the conviction.

STATUTE INVOLVED

Section 1010 of Title 18, U.S.C., provides in pertinent part:

> Whoever, for the purpose of obtaining any loan * * * from any person, * * * with the intent that such loan * * * shall be offered to or accepted by the Federal Housing Administration for insurance, * * * or for the purpose of influencing in any way the action of such Administration, makes, * * * any statement, knowing the same to be false, * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT

The petitioner was indicted in the Southern District of Indiana on two counts which charged the making of false statements on FHA credit applications in violation of 18 U.S.C. 1010. Each count in pertinent part alleged that the petitioner "for the purpose of obtaining a home improvement loan for [the borrower] and with the intent that said loan be offered to and accepted by the Federal Housing Administration for insurance, did unlawfully, knowingly and wilfully cause [the borrower] to make a false statement, to wit: [that the statement in the credit application] was false in that it showed that

the loan proceeds would be used [for specified purposes] whereas the [petitioner] then and there well knew that said statement was false in that [the borrower] had no intention of using the said loan proceeds solely for [the specified purposes] as aforesaid on the said premises" (A. 1-2).[1] The case was tried in one day to a judge without a jury. The judge found petitioner guilty on both counts and fined him $1,000 on each count and the costs of the proceedings. There was no sentence of imprisonment (A. 177–178, 179, G, 60). The pertinent evidence may be summarized as follows:

Count 1. George K. Domeika testified that two representatives from petitioner's construction company came to see him about improving his house, and later the petitioner and one of the salesmen returned (A. 56–57). After Domeika told petitioner that he had a number of bills that had to be paid before he could proceed, petitioner said he would be able to get Domeika some "extra money to pay them off" as part of an improvement loan for his house. (A. 58–59). They figured out how much was needed and entered into a contract (A. 59–61). The contract provided that Domeika would receive $950 for "labor & addition[al] pipe to install bathroom & interior finish" (Ex. 3, A. 166). The FHA credit application, which was for a $3,500 property improvement loan,

[1] Petitioner's appendix below will be cited with the prefix "A". The government appendix below will be cited with the prefix "G".